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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1937.

No. 163.

THOMAS J. BRADY,

Petitioner,

vs.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, a Corporation.

On Writ of Certiorari to the Supreme Court of the State of Missouri.

REPLY BRIEF OF PETITIONER.

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REPLY BRIEF OF PETITIONER.

Petitioner's original brief, in the main, was devoted to showing that the Supreme Court of Missouri erred in holding that the cars involved were not in use at the time of petitioner's injury. As a concomitant matter, it was shown that the petitioner's injuries were directly and proximately due to the failure of the respondent to comply with the requirements of the Safety Appliance Act.

The respondent, in its brief, labors long in an effort to show that the petitioner was not within the class of persons intended to be protected by the Safety Appliance Act. This brief is to answer that proposition.

Case Concededly Controlled by Safety Appliance Act.

Both parties are agreed that "the train of cars was in the possession of defendant (respondent), for they had not as yet been delivered to the Wabash * * *" (Respondent's Brief, p. 29). Petitioner contends that the Federal Safety Appliance Act exclusively governs this case, and respondent is apparently in accord with this thought, for it states, "* * * we think the case is governed solely by the Federal Safety Appliance Act and the federal law" (Respondent's Brief, p. 24).

No Assumption of Risk by Petitioner.

Notwithstanding that both parties agree that the Safety Appliance Act, and that act alone, must govern petitioner's rights, the respondent, in its brief, attempts to argue that petitioner cannot recover because he should be held to have assumed the risk (Respondent's Brief, pp. 29-30). A complete answer to such contention is that Section 7 of the Safety Appliance Act, which concededly governs this situation, abolished the defense of assumption of risk in the following language:

> "Any employee of any common carrier engaged in interstate commerce by railroad who may be injured by any locomotive, car or train in use contrary to the provisions of this chapter shall not be deemed thereby to have assumed the risk thereby occasioned, * * *" (March 2, 1893, c. 196, Sec. 8, 27 Stat. 532, 45 U. S. C. § 7.)

Petitioner Within Class of Persons Within Protection of Safety Appliance Act.

Respondent, in its brief, states (p. 29):

> "It is true that defendant (respondent) tendered the car to the Wabash and therefore to plaintiff (petitioner) for inspection, but that was plaintiff's business, that of inspection. His class of work puts him out of the protection of the grabiron act, and he assumed the risk." (Parenthetical portions ours.)

We submit that the Safety Appliance Act is not restricted in its application in the manner above contended by respondent. The act is not confined to any specified class of employees. This Court has consistently ruled, since the decision in Louisville & Nashville R. Co. v. Layton, 243 U. S. 617, l. c. 620, that:

> "The language of the acts and the authorities we have cited make it entirely clear that the liability in damages to employees for failure to comply with the law springs from it being made unlawful to use cars not equipped as required—not from the position the employee may be in *or the work which he may be doing at the moment when he is injured.* This effect can be given to the acts and their wise and humane purpose can be accomplished only by holding, as we do, that carriers are liable to employees in damages whenever the failure to obey these safety appliance laws is the proximate cause of injury to them *when engaged in the discharge of duty.*"

We do not believe that these holdings can be overthrown or their effect obviated by a contention that the petitioner's duties, of necessity, required him to submit himself to any danger which might arise from a defective safety appliance. While it is true that, in inspecting these interstate

cars, in order to facilitate their journey, petitioner was looking for defects and he was subject to the slight danger incident to such an inspection, the respondent should not be permitted to greatly increase the danger to petitioner as a result of its failure to comply with its mandatory, absolute and continuous duty under the law, without incurring liability for petitioner's injuries resulting from such greatly increased danger. The necessary effect of holding otherwise would be that respondent could fail utterly to discharge its duties under the act and could tender to any receiving carrier cars which were positively defective and in violation of the Safety Appliance Act, and yet be absolved of all liability for injury resulting therefrom, although knowing that an inspector for the receiving carrier would necessarily have to encounter such increased dangers resulting from the defects in order to properly perform his duty to determine whether the cars should be accepted or rejected by his employer (R. 54). In requesting this Court to so hold, respondent cites the case of Kurtz v. Detroit T. & I. R. Co., 238 Mich. 289, 213 N. W. 169, in which it was held, substantially, that no liability could attach to the delivering carrier *after an inspection was made by the receiving carrier and after the receiving carrier had accepted the cars and put them in service.* From that case it is plain that if the delivering carrier's duty ends after an inspection and acceptance on the part of the receiving carrier, then it necessarily follows that the duty of the delivering carrier continues until such events have in fact transpired. In the instant case the respondent, as the delivering carrier, is not in the same position as that of the petitioner's employer, the receiving carrier. The receiving carrier (petitioner's employer, the Wabash Railway Company) had the right to determine whether the

cars tendered to it by the respondent delivering carrier complied with the Safety Appliance Act (45 U. S. C., § 3), and the right to accept or reject, as it saw fit, any defective cars; and until such time as acceptance or rejection took place, the cars remained in the use and service of the respondent delivering carrier. For the purpose of exercising such rights, the receiving carrier (Wabash Railway Company) had the inherent right to cause petitioner, as its agent and servant, to make the inspection. Petitioner, therefore, might well be adjudged to have no rights under the Safety Appliance Act in so far as his employer, the Wabash Railway Company, was concerned, because his employer had neither hauled, used nor accepted the cars, and, further, because his employer was entitled to delegate the duty of inspection to petitioner without becoming liable for defects which existed by reason of any failure on the part of the respondent delivering carrier (Brady v. Wabash Ry. Co., 329 Mo. 1123, 49 S. W. [2nd] 24). Obviously, the respondent delivering carrier is not in the same position. Its position is the direct opposite. It follows just as surely as night follows day that, if the receiving carrier is not liable because it must be given the opportunity of inspection and of acceptance or rejection, the delivering carrier must contemplate such inspection, and its liability is absolute because it has had the opportunity of inspection and has hauled and continued to use a car with defective equipment.

Notwithstanding the foregoing, the respondent would appear to argue that its position was identical with that of the receiving carrier. It contends for the same immunities that might be extended to the receiving carrier. It employs strong language in an effort to be persuasive on this point. It states, at page 24 of its brief, that, "In hunting

for defective safety appliances an inspector puts his head in the lion's mouth." Again, it states, at page 31 of its brief, that "Plaintiff (petitioner) was an inspector charged with the duty of finding defects, that of putting his head in a lion's mouth or feeding a cobra. It was his duty to protect himself from being bitten by them." Apparently, Congress must have realized that defective safety appliances were almost as dangerous as a lion or a cobra, and hence it enjoined upon the delivering carrier the absolute duty to see that cars with defective safety appliances thereon were not used in being tendered to receiving connecting carriers. This vague talk about a lion or a cobra will not change the delivering carrier's position—it only serves to emphasize the character of respondent's violation of its duties. Respondent positively knew that an inspector of the receiving carrier would be compelled to encounter the defective equipment upon the cars if tendered in violation of law (R. 54). Respondent arrogantly sets up its own violation of law as a complete defense, when, as a matter of fact, the law gives employees such as the petitioner an absolute right of action for injuries caused by such a violation. The mere fact that the petitioner could not enforce liability as against his employer, who stood in an entirely different position because it had neither hauled, used, nor accepted the defective equipment prior to petitioner's injury, certainly cannot be held to avail the respondent.

It cannot be seriously stated that Congress intended to restrict the humane provisions of the Safety Appliance Act to the smallest possible number of employees, especially when it is considered that employees of the character of petitioner are the very ones who must use *all* of the safety appliance equipment in order to properly perform their duties. A brakeman, or a switchman, may use a particular handhold on a particular car. With fifty cars in a train,

he will probably use but very few of the great number of handholds on said train. The inspector for a receiving carrier, however, must use *all* of the handholds on *all* of the cars in order to properly perform his duties. He is, therefore, the one person who has a greater use of these appliances than any other. Can it logically be said that the one person who must use these appliances more than any other individual is the only person that Congress intended should not be covered by this enactment? The respondent knew full well that this petitioner, or another employee of his character, would have to make an inspection of the cars tendered by respondent before petitioner's employer, the Wabash Railway Company, would accept the cars (R. 54). Aside from the crew operating the train tendered for transfer, the petitioner and his fellow employee were the very persons who most needed the beneficent protection of the safety appliance legislation. We think that it does not rise to the height of respectable nonsense to contend that the delivering carrier (respondent in the instant case) is not liable merely because a receiving carrier would not be liable under the same circumstances.

No Negligence on Part of Petitioner.

Respondent states, at page 32 of its brief, "that plaintiff (petitioner) exercised all the care possible, in testing it (i. e., the grab iron), by shaking it with his hand before he put his weight on it, and yet he did not discover that the grab iron in any way was defective." It should be remembered that this accident occurred during the nighttime (R. 15); that this particular grab iron was upon the roof of the car (R. 19, 20); that plaintiff's body, while ascending the ladder, was at all times below the roof level (R. 51-52, 55); that he reached above his head and placed

his hand upon the grab iron for the purpose of pulling himself upwards (R. 51-52); that such was the regular method of using said grab iron. We mention these details merely to show that petitioner had no opportunity to discover the rotted condition of the roof, which made said grab iron insecure. Concededly, he used extraordinary care, but that was not sufficient to protect him. He had no right to assume that respondent had set a trap for him, nor that it had failed in its duty under the law. True, he was looking for defects. What defects? Those defects which were likely to develop since it was last inspected. Ordinarily, his duty is not fraught with peril. Had respondent performed its duty, this car would not have been delivered in that condition in violation of law. Petitioner, in the ordinary course of duties, might find a "hotbox," a bad coupler, a defective drawbar, an inefficient brake, an inoperative pin lifter, a broken seal, and yet finding such would not entail danger to him. It is hard to imagine how petitioner could have been subjected to a greater hazard than to have his path of work endangered by a defective grab iron on the car roof. This defect created an unusual hazard in the very path of petitioner's place of work. Had respondent's employees negligently placed an obstruction on the ground in such place that it was certain to cause injury to inspectors for a receiving carrier, would their employer be acquitted of liability? Would it be heard to answer, "You are an inspector and therefore your limbs may be broken without recompense"? Such would be untenable. Yet here we have a delivering carrier guilty of a positive violation of law setting up its violation as a defense. It says, at page 32 of its brief, "If plaintiff did not discover the defect upon using extraordinary care, then should defendant be held to an absolute discovery of it under rule?" The answer is emphatically yes, a thousand

times yes, because the law so states. The law makes the duty absolute. It is not a question of negligence vel non. Congress undoubtedly recognized the futility of one such as petitioner being able to establish whether or not the delivering carrier had made necessary inspections prior to its hauling and using the car. Congress unquestionably realized that the very person who was most likely to be injured, through such failure on the part of the delivering carrier, was an inspector for the receiving carrier, who was required to encounter such defect before such car would be accepted by his employer. The law is so written.

Conclusion.

The instant case is not one where a defect was discovered by petitioner prior to his injury. It is not a case where a repair was in process. Nor is it a case where a car has been withdrawn from service and placed upon a bad-order track. This is a case in which the defective car was still coupled to other cars of a train, the entire train then and there being tendered for transfer by the respondent delivering carrier to the petitioner's employer, the receiving carrier. The defective car, along with all the other cars, was actually in service and use. Their tender for transfer was but one step farther on their interstate journey. Their further movement was in immediate contemplation. They were no more out of service because they were motionless, or because the motive power had been detached, than would an automobile be out of service while its driver was making a delivery in a building, such driver having shut off the engine of the automobile and taken the keys with him.

We most earnestly submit, therefore, that this defective car which caused petitioner's injury, as well as all the

other cars which were coupled together in the train being tendered by respondent to petitioner's employer, were actually under the possession and control of the respondent and in its use and service, and that they would remain in such use and service until accepted or rejected by the receiving carrier; that the Safety Appliance Act exclusively governs petitioner's right of action; that petitioner was injured as a direct and proximate cause of respondent's failure to comply with the Safety Appliance Act, in that respondent handled and **used** this car upon its road and **used** this car in tendering it to the receiving carrier, while in a defective condition, with conscious knowledge of the fact that an inspector would be required to use its grab irons; and that the petitioner, as an inspector for the receiving carrier, was a railroad employee and was one of the employees for whose benefit the Safety Appliance Act was enacted.

Accordingly, we most respectfully submit that the judgment of the Supreme Court of Missouri, here being reviewed, should be reversed.

Respectfully submitted,

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